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Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

MAINE CENTRAL RAILROAD COMPANY, *Appellant*,

v.

RAYMOND L. HALPERIN, et al., *Appellees*.

On Appeal from the
Supreme Judicial Court of Maine

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Maine Central Railroad Company appeals the judgment of the Supreme Judicial Court of Maine sustaining the validity, under the United States Constitution, of the Maine Railroad Excise Tax so applied as to include in the calculation of the tax income earned from federal incentive per diem charges and a substantial amount of income earned outside of Maine.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine is reported at 379 A.2d 980 and is reprinted in the Appendix at pages 1a-24a below.¹ The further opinion of the Supreme Judicial Court on reconsideration is reported at 381 A.2d 8 and is reprinted in the Appendix at pages 24a-31a below. The order of the Superior Court on remand, entered December 30, 1977, is reprinted in the Appendix at pages 32a-33a below.

JURISDICTION

Appellant brought this action in the Superior Court for Kennebec County, Maine, seeking a judgment declaring that Maine's Railroad Excise Tax was unconstitutional in its application to appellant's incentive per diem income or, alternatively, to appellant's compensatory and incentive per diem income earned outside Maine. The case was referred to the Supreme Judicial Court for decision upon an agreed statement of facts. On November 16, 1977, the Supreme Judicial Court entered an opinion and judgment upholding the constitutionality of the Railroad Excise Tax against appellant's challenges. Upon appellant's motion for reconsideration, the Supreme Judicial Court entered a further opinion on December 27, 1977, reaffirming its judgment for appellees.

Appellant filed notices of appeal to this Court in both the Supreme Judicial Court and the Superior

¹ Citations to portions of the Record that are not included in the Appendix are in the form "(R. —)." Appellant has requested that the record be certified to this Court.

Court on January 13, 1978 (p. 34a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). Cases that sustain this Court's jurisdiction include *Norfolk and Western Ry. v. Missouri State Tax Comm'n.*, 390 U.S. 317 (1968); *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927); and *Dahnke-Walker Milling v. Bondurant*, 257 U.S. 282 (1921).

STATUTES INVOLVED

The Maine Railroad Excise Tax is codified at 36 M.R.S.A. §§ 2623 *et seq.* The full text of the Maine Railroad Excise Tax is reprinted in the Appendix at pages 35a-39a below. The provision of special relevance to this case, 36 M.R.S.A. § 2624, provides in pertinent part:

§ 2624. Amount of tax

The amount of the annual excise tax on railroads shall be ascertained as follows: The amount of the gross transportation receipts as returned to the Public Utilities Commission for the year ended on the 31st day of December preceding the levying of such tax shall be compared with the net railway operating income for that year as returned to the Public Utilities Commission. When the net railway operating income does not exceed 10% of the gross transportation receipts, the tax shall be an amount equal to 3¼% of such gross transportation receipts. When the net railway operating income exceeds 10% of the gross transportation receipts but does not exceed 15%, the tax shall be an amount equal to 3¾% of the gross transportation receipts.

* * *

When a railroad lies partly within and partly without the State, or is operated as a part of a line or system extending beyond the State, the tax shall be equal to the same proportion of the

gross transportation receipts in the State, and its amount shall be determined as follows: The gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated to obtain the average gross transportation receipts per mile, and the gross transportation receipts in the State shall be taken to be the average gross transportation receipts per mile multiplied by the number of miles operated within the State, and the net railway operating income within the State shall be similarly determined.

The term "net railway operating income" means railway operating revenues less the railway operating expenses, tax accruals and uncollectible railway revenues, including in the computation thereof debits and credits arising from equipment rents and joint facility rents. The Public Utilities Commission, after notice and hearing, may determine the accuracy of any returns required of any railroad, and if found inaccurate, may order proper corrections to be made therein.

Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), which authorizes the Interstate Commerce Commission to impose incentive charges on the use of boxcars, is reprinted in the Appendix at pages 39a-40a. The regulations of the Interstate Commerce Commission implementing 49 U.S.C. § 1(14)(a), which are codified at 49 C.F.R. §§ 1036, *et seq.*, are reprinted in the Appendix at pages 40a-46a.

QUESTIONS PRESENTED

The Maine Railroad Excise Tax is a franchise tax measured by the gross receipts of railroads operating within Maine. The percentage of gross receipts to be paid as tax is determined by the ratio of the railroad's

"net railway operating income" ("NROI") to its gross taxable receipts: the higher the NROI in relation to taxable gross receipts, the higher is the railroad's tax rate. The tax payable is calculated by a mileage prorate formula that apportions to the state a percentage of the railroad's gross receipts and NROI that is determined by the ratio of the railroad's miles of line lying within Maine to its total miles of line.

With the goal of alleviating a critical nationwide shortage of boxcars, the Interstate Commerce Commission has established incentive per diem ("IPD") charges, which are a rental that a railroad receives from other carriers, in addition to compensatory per diem charges, as an incident of those carriers' use of its boxcars. The purpose of the incentive charge is to induce railroads to acquire boxcars. Under the Commission's regulations, a railroad does not own IPD receipts but instead holds them in trust for only two uses: acquisition of boxcars and payment of state and federal income taxes attributable to IPD income itself. IPD income cannot be used to pay excise tax attributable to such income.

Appellant sought to exclude its IPD income from its NROI in computing its 1974 excise tax and, on that basis, paid an excise tax of \$70,623. State tax officials recomputed the tax including all IPD income earned in 1974 and assessed a deficiency of \$615,760. The questions presented are:

1. Whether application of the Maine Railroad Excise Tax to restricted incentive per diem income conflicts with federal law and federal transportation policy, in contravention of the Supremacy Clause of the United States Constitution.

2. Whether the mileage apportionment formula of the Maine Railroad Excise Tax, which in 1974 attributed to Maine for tax purposes about 84 percent of IPD and compensatory per diem income when about 97 percent of such income was in fact earned from operations outside Maine, may be applied consistently with the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution because the Excise Tax is characterized as a "franchise" tax *measured* by income and receipts, rather than as a tax on income or receipts themselves.

STATEMENT

This case emerges from the efforts of Maine to include in its railroad excise tax computations appellant's federal incentive per diem receipts, the majority of which are earned outside of Maine. Appellant resisted the inclusion of restricted IPD income in the computation of its 1975 excise tax and brought suit in state courts alleging that application of the excise tax to IPD receipts would hinder and frustrate the federal IPD program, impose a burden on interstate commerce, and impermissibly tax activities conducted beyond Maine's jurisdiction. The state courts rejected appellant's arguments, and appellant brings this appeal.

A. Factual Background

Appellant operates a railroad with lines in Maine, New Hampshire, Vermont and New Brunswick. Among the taxes to which appellant is subject is the Maine Railroad Excise Tax, 36 M.R.S.A. §§ 2623-2628. (See pp. 35a-39a, *infra*.)

The Maine Railroad Excise Tax is a franchise tax measured by the gross receipts of railroads operating

in the State of Maine, subject to several computations of significance to this case.² First, the tax rate is determined by the ratio of the railroad's "net railway operating income" ("NROI") to its gross receipts; as the ratio becomes higher, the railroad moves into higher percentage tax brackets, which range from 3.25 percent to 5.25 percent of the railroad's taxable gross receipts. Because gross receipts include all revenues, without deduction for costs of generating the revenues, very small increases in the tax rate can result in large increases in the unapportioned tax. Second, the excise tax payable to Maine is calculated by a mileage prorate formula that apportions to Maine the same proportion of the railroad's gross receipts, NROI and unapportioned tax as the railroad's miles of line in Maine bear to the railroad's total miles of line. See 36 M.R.S.A. § 2624. Third, the tax is subject to reduction by a "diminishment amount," which equals the amount by which the railroad's NROI falls below $5\frac{3}{4}$ percent of its investment in railway property devoted to transportation use, less depreciation, plus cash assets and the value of material and supplies on hand. *Id.* The purpose of this provision is to reduce the impact of the tax on railroads during years in which their earnings are relatively poor.

Triggering this litigation was appellant's large amount of restricted IPD income and receipts during 1974, when the Interstate Commerce Commission directed all rail carriers to impose IPD charges on a year-round basis, at higher rates than in the past, for the purpose of alleviating the critical shortages of box-

² A chart comparing the computation of appellant's 1975 excise tax with and without inclusion of IPD receipts appears at R. 185.

cars caused by the continuing shipment of grain to the Soviet Union and other nations. The Commission has been empowered to impose *compensatory* daily, or per diem, charges on the use of one carrier's boxcars by others since enactment of the Esch Car Service Act of 1917, 40 Stat. 101. In 1966, Congress amended Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), to authorize the Commission to include an extra, "incentive," component in per diem charges for the purpose of encouraging railroads to acquire boxcars.³

³ Twice in recent years this Court has had occasion to recount at length the history of how federal regulation of per diem charges has served as a means of influencing the nationwide distribution and utilization of boxcar equipment. *See United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973); *United States v. Allegheny-Ludlum Steel*, 406 U.S. 742 (1972).

With the enactment of the Interstate Commerce Act in 1887, regulated railroads were no longer permitted to decline to exchange their boxcars with other carriers subject to the Act. The result was that the freight cars across the nation "became in essence a single common pool, used by all roads." *United States v. Allegheny-Ludlum Steel Corp.*, *supra*, 406 U.S. at 743. For many years, railroads paid one another rentals for the use of one another's boxcars; the Esch Car Service Act of 1917 sought to solve the problems of boxcar shortages aggravated by wartime conditions by empowering the ICC to establish a system of compensatory per diem charges under which carriers would be encouraged to acquire boxcars, and be less likely to cover their own shortages of boxcars by using boxcars belonging to other carriers.

The 1966 amendments authorizing the ICC to include an "incentive" element in per diem charges were designed to remedy a severe shortage of boxcars by penalizing carriers that failed to acquire an adequate number of boxcars for their needs and by offering railroads a rate of return on boxcars sufficient to make the acquisition of boxcars an attractive investment. *See United States v. Florida East Coast Ry.*, *supra*, 410 U.S. at 230-34; H.R. Rep. No. 1183, 89th Cong., 1st Sess., p. 1, *et seq.* (1965); S. Rep. No. 386, 89th Cong., 1st Sess., p. 1, *et seq.* (1965).

In 1970, the Commission promulgated regulations establishing an incentive per diem program. Among the chief features of the regulations as issued, and as they have been amended since, are the numerous restrictions governing carriers' ownership and use of the "credit balance"—the excess of a carrier's IPD receipts over its IPD payments. The regulations have always required that credit balances be "earmarked"—that they be segregated from all other cash assets of the railroad. The earmarked funds may be used only for two purposes: (1) to acquire boxcar equipment by purchase, building, rebuilding or lease; and (2) to pay both federal and state income taxes directly attributable to the IPD credit balances themselves. 49 C.F.R. § 1036.3 (1976). The Commission has explained its intention that

"Earmarking for a specific purpose thus removes [IPD credit balances] from the general funds of the carrier. The incentive funds can be traced from the time they reach the individual railroad to the appropriate accounts in which they are retained and, in effect, held in trust. An analogy is the various statutory trusts that may be created when a bankrupt collects sales taxes. The incentive credit balances collected by the railroads do not become part of the general assets of the railroads." *Incentive Per Diem Charges*, 343 I.C.C. 49, 56 (1973).

Indeed, the Commission has reserved the power to investigate circumstances in which carriers do not make use of IPD credit balances, with an eye toward requiring surrender of the funds. *See* 49 C.F.R. § 1036.4 (1976); *Incentive Per Diem Charges*, 349 I.C.C. 303, 319-20 (1975).

The regulations have also always required that no carrier may make use of IPD credit balances until

it has first spent a prescribed amount of its own general corporate funds to acquire boxcar equipment. The purpose of this restriction has been to ensure that carriers do not use IPD credit balances to acquire equipment they would likely have acquired in any event. This restriction has been implemented by requiring that, before it uses IPD funds to acquire equipment in any year, a carrier must first have acquired in that and each preceding year the same number of boxcars that it acquired annually, on the average, during the years 1964-68. 49 C.F.R. § 1036.4 (1976).

Until 1974, appellant's IPD credit balances had not resulted in increasing its excise tax liability. In that year, however, a large credit balance accumulated because the Commission increased IPD charges. The funds were placed in the earmarked IPD fund. In accordance with the Commission's regulations, 49 C.F.R. 1036.3 (1976), appellant used IPD funds to pay the federal and Maine income tax on the credit balance income. But, when it filed its 1975 excise tax return, appellant did not include in its NROI approximately \$1.87 million, representing the 1974 IPD credit balance less federal and state income taxes on IPD income. (Appellant included within its excise tax NROI and gross receipts, by contrast, compensatory time and mileage per diem income.) Appellant computed its 1975 excise tax at \$70,623, on the basis that its proper tax rate was 3.25 percent and that it was entitled to an appropriate "diminishment amount."

The State Tax Assessor disagreed with appellant's exclusion of net incentive per diem income from NROI because, even though the new federal IPD program restricted appellant's legal interest in and right to use IPD funds, the excise tax had long defined NROI to

include "credits arising from equipment rents." On his calculation of appellant's excise tax for 1975, appellant owed \$686,383; the Assessor demanded that Maine Central pay the full amount of the tax as calculated with IPD income included within NROI.

B. The Proceedings Below

Appellant brought this action in the Superior Court for Kennebec County, Maine. Appellant prayed for a judgment declaring that Section 2624 of the excise tax statute did not include IPD credit balances within its definition of "net railway operating income." In the event that the statutory definition of NROI was held to embrace IPD credit balances, appellant sought a judgment declaring that application of the excise tax to its IPD credit balances frustrated the full effectiveness of the federal IPD program in conflict with the Supremacy Clause of the United States Constitution. Appellant also sought a judgment declaring that application of the excise tax to appellant's 1974 IPD credit balance and compensatory per diem income improperly burdened interstate commerce and taxed activity occurring beyond Maine's jurisdiction in violation of the Commerce Clause and Due Process Clause of the Fourteenth Amendment, because the excise tax apportioned to Maine 84.25 percent of all per diem receipts, while more than 97 percent of such receipts were earned from the movement of appellant's boxcars outside the State of Maine. The Interstate Commerce Commission intervened as *amicus curiae* and joined appellant in opposing application of the Maine Railroad Excise Tax to appellant's IPD credit balance.

In accordance with practice in the courts of Maine, the Superior Court certified the case to the Supreme

Judicial Court of Maine for resolution on a statement of stipulated facts in which appellant, appellees, and the Interstate Commerce Commission each concurred. After briefing and oral argument, the Supreme Judicial Court resolved all issues for appellees and remanded the case to the Superior Court for entry of judgment.

The Supreme Judicial Court rejected the Interstate Commerce Commission's view that IPD credit balances are restricted funds held in trust—a view expressed in both its briefs to the court below and in the Commission decisions promulgating and interpreting IPD regulations; the Court observed that “[t]his is a loose use of the ‘trust’ concept which confuses . . . correct analysis of the issue before us.” (P. 8a, *infra*.) Without analyzing the federal restrictions on ownership and use of IPD credit balances, and the impact of those restrictions on appellant's ability to use IPD funds, the court below held that the “owning railroad is the primary beneficiary of the [IPD] charges.” (*Id.*) On that basis, the court held that IPD receipts increase the “value of the franchise” in a manner warranting imposition of the excise tax on IPD credit balances without regard to the restrictions on use of the funds.

Applying a self-conceived balancing analysis, the court below also held that application of the excise tax to appellant's IPD credit balance did not unduly hinder or frustrate the federal IPD program in violation of the Supremacy Clause of the United States Constitution. It said that, despite the tax, appellant would continue to have some, albeit a diminished, incentive to acquire boxcars. (Pp. 11a-12a, *infra*.) The court minimized the problems posed by the need to pay the excise tax out of general corporate funds that otherwise would

be applied to acquiring boxcars to satisfy the IPD “base period” requirements: it explained that appellant could make “appropriate use of its financial planning resources” to limit its IPD credit balances to a level that would not burden general corporate assets with the obligation to pay higher excise taxes. It added that, in any event, the frustration of appellant's ability to use IPD receipts for the acquisition of boxcar equipment would not unduly hinder the IPD program other than in Maine. (Pp. 13a-15a, *infra*.) The court reasoned that, if appellant could not use its IPD credit balances, the funds might be surrendered to others for their use in acquiring boxcars. (*Id.*)

Finally, the court below rejected appellant's challenge to the manner in which the mileage apportionment formula resulted in Maine's allocation to itself for tax purposes some 84.25 percent of all per diem income, when more than 97 percent of that income had been earned from the movement of boxcars outside the State of Maine. The court reasoned that the excise tax was an “apportioned” tax and that, so long as some effort were made to apportion the tax, a “rough approximation” was sufficient to avoid burdening interstate commerce. (Pp. 18a-19a, *infra*.) The court explained that, in any event, the question of fair apportionment is of little significance in this case because the Maine Railroad Excise Tax merely *measures* the tax by reference to an apportionment of income and gross receipts. The tax itself, the Court emphasized a number of times, is levied directly on franchise values, not on income or receipts. (Pp. 27a-29a, *infra*.)

The Supreme Judicial Court remanded the case to the Superior Court for the entry of judgment. On December 30, 1977, the Superior Court entered judg-

ment for appellees in the amount of \$756,849.12. (Pp. 32a-33a, *infra*.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. Application Of The Maine Railroad Excise Tax To Appellant's Incentive Per Diem Income Frustrates The Full Effectiveness Of The Federal Incentive Per Diem Program In Violation Of The Supremacy Clause Of The Constitution.

The opinion of the court below upholds imposition of the Maine Railroad Excise Tax in a manner that interferes with the federal IPD program. On its own view that railroads such as appellant are the real "beneficiaries" of IPD charges, the court accorded no weight to the numerous restrictions the Commission has placed on IPD funds for the purpose of ensuring that railroads hold them in trust for the acquisition of boxcars.

In consequence, appellant was charged with an excise tax that was calculated by reference to restricted IPD funds as they were received. In fact, these funds could not be used until the Commission's restrictions were satisfied and the funds were actually devoted to the acquisition of boxcars. They could not be used to pay the increased excise tax they generated. Such taxation of IPD funds is at odds with the Commission's express intention that no railroad's general corporate assets should be burdened by increased tax liability attributable to restricted IPD income. Not only is the inclusion of IPD income in the calculation of the excise tax inconsistent with the Commission's intent, it also reduces the rate of return on boxcar investment deemed necessary by the Commission to induce carriers to acquire boxcar equipment and can, as illustrated by appellant's case, actually make it disadvantageous for a

carrier to receive IPD income. For these reasons, the Maine Railroad Excise Tax as applied to include restricted IPD income frustrates the full effectiveness of the federal IPD program and therefore violates the Supremacy Clause of the United States Constitution.

Taking into account these considerations, an Interstate Commerce Commission official stated, in uncontradicted and stipulated testimony, that imposition of the excise tax in the manner endorsed by the court below hinders and impedes the federal IPD program:

"In my opinion, the assessment of an excise tax computed under the Maine Excise Tax provisions, as interpreted by the State of Maine Tax Assessor, against railroads having a net credit balance of Incentive Per Diem Charges is contrary to the intent of the Commission and would have a substantial adverse effect upon and conflict with the policies and goals of the Commission in this area." (R. 202.)

Save for a brief footnote reference (p. 16a, n.11, *infra*), the court below paid as little heed to the testimony and arguments of the Commission as it did to the intent and structure of the regulations implementing the Federal IPD program. The court did so because it engaged in an analysis rooted in an erroneous conception of federalism, under which it thought that its role was to find a means of accommodating conflicting state and federal law, rather than enforcing federal law as paramount in circumstances where state law threatens achievement of the full range of federal objectives.

1. Since the early days of the nation's history, the legal foundations of federalism have rested on the principle that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any man-

ner control the operation of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 435 (1819). As restated more recently, this "controlling principle" commands that "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v. Campbell*, 402 U.S. 637, 652 (1971); see also *Ray v. Atlantic Richfield*, — U.S. — (No. 76-930, decided March 6, 1978), slip op. at p. 5; *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 240 (1967); *Sears, Roebuck & Co. v. Stiffel*, 376 U.S. 225, 229 (1964); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714, 722 (1963); *Free v. Bland*, 369 U.S. 663, 666 (1962); *Hill v. Florida*, 325 U.S. 538, 42 (1945); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Congress enacted Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), because "since World War II [boxcar shortages] have become chronic." H.R. Rep. No. 1183, 89th Cong., 1st Sess. 2 (1965). To deal with this crisis of nationwide proportion, Congress authorized the Interstate Commerce Commission to apply its expertise to the task of structuring an incentive per diem program. In fixing per diem compensation under Section 1(14)(a), the Commission was empowered to take into account the national level of ownership of freight cars and other factors affecting freight car ownership, and to determine

"whether such [per diem] compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition

and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

When the Commission promulgated regulations for the implementation of Section 1(14)(a), those regulations received the protection of the Supremacy Clause. See, e.g., *Free v. Bland*, 369 U.S. 663 (1962); *Miller v. Arkansas*, 352 U.S. 187 (1956).

The court below heeded none of these principles. Instead, it employed a wholly novel—and erroneous—standard in determining whether the application of the excise tax conflicted with federal law. The Court applied a balancing analysis, under which it concluded that the federal regulations must give way to the excise tax to the extent that federal objectives could be achieved through alternative means that would not burden the State's collection of the excise tax. It explained that the accommodation of state and federal objectives struck by the balancing analysis was rooted in "the relativity of the values at stake and the lack of any single generalized guiding principle." (P. 10a, *infra*.) This analysis utterly ignored the "single generalized guiding principle" that state law must yield where its application "frustrates the full effectiveness of federal law."

2. The court below attached no significance to the Commission's oft-expressed policy that restrictions on the use of IPD credit balances, which forbid use of the funds for general corporate purposes, are the heart of the regulatory scheme. The Commission has explained that

"In the absence of earmarking, the net incentive balances would obviously be deposited in the general funds of the railroads, which could then be

expended for many purposes having little or nothing to do with the purposes of the statute. The statute was not adopted to provide the railroads with merely increased compensation for the use of the cars The net balances derived from the incentive charge are not properly part of the working capital of the railroad." *Incentive Per Diem Charges*, 337 I.C.C. 217, 227-28 (1970).

The Commission has made clear that the earmarking of funds is meant to impose restrictions not only on the railroad receiving IPD payments, but on its creditors, as well. The Commission has issued an interpretive ruling holding that, because IPD receipts are earmarked and "in effect held in trust" for the benefit of the nation's boxcar needs as a whole, the creditors of a railroad in bankruptcy may not invade the bankrupt's restricted IPD fund. *Incentive Per Diem Charges*, 343 I.C.C. 49, 56 (1973).⁴

The court below, by contrast, concluded that "the owning railroad is the primary beneficiary of the [IPD] charges." (P. 8a, *infra*.) It correctly observed (*id*) that cars acquired with IPD funds "become the outright property of the railroad." See 49 C.F.R. § 1036.3 (1976); *Incentive Per Diem Charges*, 343 I.C.C. 49, 56 (1973). But the Court ignored that "IPD charges are regulatory and not compensatory." *Illinois Terminal R.R. v. United States*, 541 F.2d 201, 206 (8th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977). It did not limit application of the excise tax to the "increased

⁴ Cf. *Matter of Chicago, R.I. & P.R.R.*, 537 F.2d 906 (7th Cir. 1976), in which the court of appeals held that the Commission's authority over compensatory per diem and IPD charges supersedes the power of a reorganization court to prescribe the classification and priority of a bankrupt railroad's per diem creditors.

value of the franchise" attributable to boxcars actually acquired with IPD credit balances. Instead, the court permitted the tax to be levied directly on the IPD credit balances themselves.⁵

The court's refusal to give weight to the restrictions the Commission has imposed on ownership and use of IPD funds clashes with the IPD regulations for the further reason that the Commission "did not envision or intend that [IPD] charges would result in added financial burdens on the corporate earnings and assets of creditor railroads." (R. 202.) Since IPD funds can be used only for the acquisition of boxcars or the payment of income taxes attributable to IPD credit balances, 49 C.F.R. § 1036.3 (1976), appellant's general corporate assets are burdened with the obligation to pay the Maine Railroad Excise Tax in precisely the manner that the Commission's IPD regulations meant to prevent.

3. The Supreme Judicial Court's refusal to accord weight to the Commission's earmarking and other restrictions on the ownership and use of IPD funds was but the first way in which the court's decision threatens to unravel a tightly-knit regulatory scheme. It is striking that the court's opinions fail entirely to

⁵ This flaw in the court's reasoning produced a further inconsistency: it observed that, if appellant were unable to make use of IPD credit balances to acquire boxcars, the funds might have to be surrendered under federal regulations making them available for others to use for acquiring boxcars. (Pp. 14a-15a, *infra*.) The court seemingly failed to recognize that, in such an event, appellant would have paid an excise tax on IPD credit balances which it might never use to increase "the value of the franchise."

address the evidence and arguments adduced below concerning the ways in which application of the excise tax to appellant's IPD receipts undermines the goals of the Commission's IPD regulations by reducing the carriers' incentive to buy boxcars and by threatening their ability to benefit from IPD credit balances.

In establishing the amount of IPD charges, the Commission deliberately sought to "establish a level, which when combined with the basic per diem charge, would produce an annual 12 percent rate of return on investment in general unequipped service boxcars." (R. 197.) The purpose of the targeted rate of return was to "produce an incentive for the railroads to invest in general service unequipped boxcars rather than investing in nontransportation enterprises." (*Id.*) In computing the targeted rate of return, the Commission took into account the impact of both federal and state income taxes and assured the target rate of return by authorizing railroads to pay the income taxes attributable to IPD income from the restricted IPD fund itself. *Id.*; 49 C.F.R. § 1036.3 (1976). The Commission intended that no other taxes would be imposed on IPD income. (P. 19, *supra*; R. 197-200.) *

Appellant's circumstances illustrate several distinct ways in which the unforeseen financial burden imposed on the corporate assets of carriers by the excise tax could frustrate the Commission's regulatory scheme. In the first place, the amount of the excise tax attributable to the restricted IPD credit balance received in

* See also R. 46, 50-52, 76, 87; Incentive Per Diem Charges, 337 I.C.C. 183, 187-89, 213, 224 (1969); *Florida East Coast Ry. v. United States*, 368 F. Supp. 1009, 1016-17 (M.D. Fla. 1973) (three-judge court), *aff'd per curiam*, 417 U.S. 901 (1974).

1974—some \$615,000—exceeded appellant's total ordinary net income for the years 1974 and 1975 by a substantial amount. In consequence, appellant earned insufficient general corporate funds in those years with which to acquire any boxcars, and with which to satisfy "base period" rules conditioning use of IPD credit balances. That fact underscores the anomaly of assessing a tax on hypothetical increases of "value of the franchise" when the tax itself could prevent use of IPD funds to increase the value of the franchise.

Second, application of the excise tax to IPD credit balances frustrates the federal IPD program by reducing substantially the 12 percent target rate of return on boxcar equipment that the Commission concluded would be a sufficient incentive to induce carriers to invest in additional boxcar equipment. Third, the excise tax can, as in the case of appellant, actually make it disadvantageous to receive IPD income, for even though a railroad might not be able to use the funds to acquire boxcars, it nevertheless can be charged with paying, from general corporate funds, an additional tax. That, indeed, was precisely the conclusion of a Commission official:

"If corporate funds must be tapped to pay the increased excise tax, the attractiveness of the investment in boxcars which would generate more Incentive Per Diem Charges is obviously not as great as it is when the railroad does not experience this increased financial burden. The extreme example is found in the case of Maine Central Railroad where the inclusion of the Incentive Per Diem Charges results in an excise tax larger than the net ordinary income for the years 1974 and 1975 available to pay that tax. In my opinion, in such a situation, the imposition of an excise tax so com-

puted would have a severe adverse effect on the incentive which the Commission intended to create when it adopted Incentive Per Diem Charges." (R. 200.)

It is no answer to the problem of frustration of the federal IPD program to say, as did the court below, that "appropriate use of its financial planning resources will enable Maine Central readily to compute the level at which generation of additional incentive charges will excessively burden general corporate assets." (P. 14a, *infra*.) Appellant must permit other carriers to use its boxcars. Perhaps appellant could have waived collection of IPD charges, although it is far from clear that the Commission would have permitted it to do so. But that stark alternative only dramatizes the way in which the application of the excise tax frustrates the federal IPD program.

4. The court below acknowledged that the application of the excise tax to IPD credit balances burdens the federal IPD program to some extent. But the court concluded that the goals of the federal program could be satisfactorily attained by means other than those which the Commission has preferred. Thus, the court found that the IPD program would not be totally frustrated because the Commission could direct in the future that appellant's unused IPD funds be surrendered for use by other carriers or boxcar owners. (Pp. 14a-16a, *infra*.)

The Court's incursion into federal policy-making ignores that the Commission's regulations clearly contemplate that surrender of IPD funds is a last resort. The preferred mechanism for implementing the goals of the IPD program is for railroads to use their ac-

cumulated IPD credit balances to acquire their own boxcars. 49 C.F.R. § 1036.4 (1976). The Commission never contemplated that carriers would be denied the use of IPD credit balances by reason of burdens imposed by state legislation. Indeed, the Commission has intended that IPD program would assist carriers that both need and possess a large boxcar supply because "such roads are generally the very railroads that show the most serious need for cars in the heavy loading season." *Incentive Per Diem Charges*, 337 I.C.C. 217, 227 (1970). Appellant—which is located in the extreme northeastern corner of the nation and which originates lumber and paper products on its lines—has special need for a large supply of boxcars. In the proceedings below, no party disputed the fact that appellant's geographical remoteness and the needs of its shippers require appellant to possess "a technically excess supply of cars" and that the IPD program is indispensable if appellant is to obtain the cars it needs. (R. 206). The court below was completely insensitive to the fact that it is the very purpose of the IPD program to assist carriers in appellant's position. The court's views of appropriate transportation policy must yield to the Commission's.

5. From what we have said, we believe it evident that the opinion of the court below authorizes the implementation of a state taxation statute in a manner that "frustrates the full effectiveness of federal law." *Perez v. Campbell*, 402 U.S. 637, 652 (1971). The Supreme Judicial Court's balancing test has no sanction in the law and leads to results that infringe important federal interests.

II. Application Of The Maine Railroad Excise Tax To Appellant's Per Diem Income Imposes A Burden On Interstate Commerce And Taxes Activity Beyond Maine's Jurisdiction.

Because 84.25 percent of appellant's miles of line lie within Maine, Section 2624 of the Maine Railroad Excise Tax conclusively presumes that 84.25 percent of appellant's gross receipts and NROI are subject to Maine's taxing power. In 1974, more than 80 percent of appellant's NROI was attributable to compensatory and incentive per diem receipts, and more than 97 percent of those receipts were earned from the movement of appellant's boxcars outside the State of Maine. Nevertheless, the Tax Assessor apportioned appellant's per diem income in accordance with the statutory formula and presumed that 84.25 percent of that income was attributable to Maine. Had per diem income been apportioned to Maine on a basis reflecting the income actually earned within Maine, appellant's 1975 excise tax would have been \$70,623 instead of \$686,383. The Supreme Judicial Court upheld the application of the apportionment formula because it believed that a "rough approximation" is all that is required under the circumstances (p. 19a, *infra*) and because it thought that a "franchise" tax measured by income and gross receipts is not subject to the rules this Court has laid down for apportioning taxes levied directly on income and receipts themselves. (Pp. 26a-29a, *infra*.)

1. The decision of the court below upholding the application of the apportionment formula is contrary to repeated decisions of this Court imposing constitutional limitations to govern the rules of thumb employed by states to determine the reach of their authority to tax businesses operating both within and be-

yond their territory. The court below placed great weight on the fact that the mileage prorate formula used by Maine, applied in somewhat different form, was sustained in *Maine v. Grand Trunk Ry.*, 142 U.S. 217 (1891). To be sure, such a general formula is valid when it may fairly be assumed that a railroad's income, receipts or property are allocable among states for tax purposes in rough proportion to the mileage in each state. But the formula must give way where its automatic or mechanical application results in the taxation of property or activity beyond the state's jurisdiction.

In *Fargo v. Hart*, 193 U.S. 490, 499-500 (1904), Mr. Justice Holmes explained that it is "reasonable and constitutional to get at the worth of [a line of railroad] in the absence of anything more special, by a mileage proportion . . . so long as it fairly may be assumed that the different parts of a line are about equal in value." But if a railroad "had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense." *Id.* Application of the mileage formula in *Fargo* transgressed both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause because, "[i]t involved an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States." *Id.* at 502; see also *Wallace v. Hines*, 253 U.S. 66, 69 (1920); *Union Tank Line Co. v. Wright*, 249 U.S. 275, 282 (1919).⁷

⁷ Numerous decisions of this Court reaffirm that "the test whether a particular state exaction is such as to invade the authority of Congress to regulate trade between the States, and the test for a

Even a tax formula that is lawfully imposed for many years—like the mileage apportionment formula of the Maine Railroad Excise Tax—may become unlawful in its application to a particular year's exceptional circumstances. In *Norfolk & Western Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968), this Court held that Missouri's mileage apportionment formula could no longer be constitutionally applied to a railroad after it acquired additional properties within the state whose average value per mile was far below the average value per mile of its properties lying outside the state. In such circumstances, this Court wrote, the state is obliged by the Constitution to make appropriate modifications in the taxing formula:

"But when a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in its particular case, *the State is obliged to counter that evidence or to make the accommodations necessary to assure that its taxing power is confined to its constitutional limits*. If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail. 390 U.S. at 329." (Emphasis supplied.)

As if oblivious to the weight of precedent, the court below was content to sweep aside the remarkable fact

State's compliance with the requirements of due process in this area are similar." *Nat'l Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753, 756 (1967); *see also* *Central R.R. v. Pennsylvania*, 370 U.S. 607, 612 (1962); *Ott v. Mississippi Valley Barge Line*, 336 U.S. 169, 174 (1949). The due process claim arises because tax is imposed on out-of-state value that is beyond the legitimate reach of the taxing state. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954); *Greenough v. Tax Assessors*, 331 U.S. 486, 491 (1947); *Cf. American Oil Co. v. Neill*, 380 U.S. 451, 457-59 (1965).

that Maine had allocated to itself some 84 percent of per diem income, of which some 97 percent had indisputably been earned from operations conducted outside the State of Maine, with the observation that a "rough approximation, as a practical matter, is the norm of any state taxation system." (P. 19a, *infra*.) There is no sanction in the Constitution and no precedent in the decisions of this Court for an approximation nearly so rough as Maine's in this case.

2. Perhaps the court below meant its "rough approximation" standard for fair apportionment to be read in conjunction with its extended discussion of why, in its view, a franchise tax *measured* by gross receipts and NROI need not be apportioned with the same precision as a tax laid directly on gross receipts and NROI themselves, or upon the assessed value of personal property. (Pp. 20a-21a, *infra*.) The court based this analysis on the proposition that, because the Maine Railroad Excise Tax is levied on the "value of the franchise," Maine could ignore the source of components of appellant's receipts, NROI and other "franchise" value. (Pp. 20a-22a, *infra*; pp. 26a-27a, *infra*.)

There are two fundamental flaws in the Court's analysis. In the first place, the Court is incorrect to assume that invocation of the words "franchise value" or "intangible values" shields from constitutional scrutiny the accuracy of an apportionment formula. It is clear, of course, that fair apportionment is required no less of a state tax because it is denominated a "franchise" tax. *See, e.g., Southern Ry. v. Kentucky, supra*, 274 U.S. at 80; *see also Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 585 (1907); *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102 (1934); *Great Northern Ry. v.*

Weeks, 297 U.S. 135 (1936). And though the court below took great pains to explain why it thought *Maine v. Grand Trunk Ry.*, *supra*, as amplified by *Galveston, H. & S.A. Ry. v. Texas*, 210 U.S. 217 (1908), demarcated clear distinctions between franchise taxes and other sorts of taxes, it failed to acknowledge this Court's observation in *Galveston* that, although a franchise or other tax "might be estimated *prima facie* by gross income computed by [a mileage allocation formula] . . . [n]either the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away the [judicial] duty to consider its nature and effect." 210 U.S. at 226-27.

This Court's recent decision in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), confirms the principle that the name attached to a tax will not affect the scrutiny it receives; all taxes must be tested alike by "the question whether the tax produces a forbidden effect." Just as "privilege" taxes and "franchise" taxes cannot occupy different statuses in the eyes of the Constitution merely because of the labels attached to them, the "franchise" tax imposed by Maine "must receive the careful scrutiny of the courts" to determine its impact on interstate commerce. *Id.* at 288-89 n.15. Indeed, this Court has been especially vigilant to inquire into the application of an apportionment formula in cases where a state has claimed that its formula takes into account intangible value, going concern value, and comparable measures of value. *See, e.g., Norfolk & Western Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968); *Union Tank Line v. Wright*, 249 U.S. 275 (1919); *Fargo v. Hart*, 193 U.S. 490 (1904).

That brings us to the other critical flaw in the Supreme Judicial Court's analysis of why a franchise tax measured by gross receipts and NROI may be apportioned differently from a tax laid directly on receipts and NROI: the court below identified no increase in the value of the franchise, or increased "intangible" value, deriving from the great majority of the per diem income earned outside Maine.* We have already shown that IPD income, because of the restrictions governing its use, cannot increase the "value of the franchise" until a railroad has satisfied the requirements of the federal regulations and until it has actually used the funds for the acquisition of boxcars; we have also shown how the court below was compelled to acknowledge how the impact of the restrictions and of the excise tax itself threatened appellant with having to surrender—but nonetheless to pay excise tax on—large amounts of IPD funds it may never use to increase the "value of the franchise." (Pp. 14-24, *supra*.) Under the circumstances, there can be no permissible basis for application of the mileage apportionment formula to appellant's IPD income during 1974. *Cf. Norfolk and Western Ry. v. Missouri Tax Comm'n, supra; Wallace v. Hines, supra.*

* IPD credit balances constituted approximately 92 percent of all per diem income earned by appellant in 1974. (R. 37.)

CONCLUSION

The decision below conflicts with the decisions of this Court. It cannot be sustained on the grounds advanced by the court below. If allowed to stand, the decision frustrates important federal policies, burdens interstate commerce, and taxes property and activity beyond the jurisdiction of the State of Maine. The Court should note probable jurisdiction and set the case for argument on the merits.

Respectfully submitted,

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APPENDIX

Opinion of the Supreme Judicial Court of Maine

Date Opinion Filed

November 16, 1977

Reporter of Decisions

Decision No. 1555

Law Docket No. Ken-77-14

MAINE CENTRAL RAILROAD COMPANY

v.

RAYMOND L. HALPERIN, ET AL.

WERNICK, J.

On July 23, 1975 plaintiff Maine Central Railroad Company commenced a civil action in the Superior Court (Kennebec County) seeking an adjudication by declaratory judgment (14 M.R.S.A. § 5951-5963) that either (1) 36 M.R.S.A. § 2624, correctly interpreted, does not contemplate, for the purpose of the computation of Maine's excise tax on railroads, the inclusion within "net railway operating income" of "incentive per diem" charges (49 C.F.R. Part 1036, as hereinafter more fully explained); or (2) if the statute requires such inclusion, in that particular it violates the Constitution of the United States, contravening the "Supremacy" Clause of Article VI, or the "Commerce" Clause of Section 8 of Article I, or both.

Named as defendants in the action were the State Tax Assessor, Raymond L. Halperin, and the Attorney General, Joseph E. Brennan. The Interstate Commerce Commission was permitted to intervene in the action as *amicus curiae*. Issue was joined by an answer filed by defendants. Defendant State Tax Assessor also filed a counterclaim demanding judgment against plaintiff for balances of excise tax payments due for three quarters in 1975, in the

amounts of \$205,252.93, \$228,794.33 and \$228,794.33 as ascertained due on June 15, September 15 and December 15, respectively, "plus interest of 10% from the due dates of the respective payments." These amounts were the total additional assessment attributable to the failure of Maine Central to include "incentive per diem" charges in its "net railway operating income" in the computation of the railroad excise tax for the year 1974.

Pursuant to Rule 72(b) M.R.Civ.P., the case has been reported to us on an agreed statement of facts for our determination of the rights of the parties.

I. THE MAINE EXCISE TAX ON RAILROADS

Since 1881 the State of Maine has imposed upon every corporation operating a railroad in the State

"an annual excise tax for the privilege of exercising its franchises and the franchises of its leased roads in the State." (Currently, 36 M.R.S.A. § 2623)

Presently, this annual excise tax together with the tax provided for in 36 M.R.S.A. § 561 are "in place of all taxes upon the property of such railroad." (36 M.R.S.A. § 2623)¹ The amount of the tax is equal to a percentage of the gross transportation receipts. The applicable percentage rate increases with increase in the proportion of

¹ Section 561—which together with § 2623 operates in lieu of all property taxes—provides: "The buildings of every railroad corporation or association, whether within or without the located right-of-way, its land and fixtures outside of its located right-of-way, and so much of its located right-of-way over which all railroad service has been abandoned, are subject to taxation in the places in which the same are situated, as other property is taxed therein, and shall be regarded as nonresident land." Thus, § 2623 operates as a tax upon the railroad franchise treated as property, in lieu of property tax on railroad right-of-way land and fixtures.

net railway operating income to gross transportation receipts. "Net railway operating income" is statutorily defined as

"railway operating revenues less the railway operating expenses, . . . including in the computation thereof debits and credits arising from equipment rents" (36 M.R.S.A. § 2624)

II. INCENTIVE PER DIEM CHARGES

"Incentive per diem" charges went into effect in 1970 as part of the federal government's continuing efforts to remedy a chronic shortage of railroad freight cars. The history leading to this resort to incentive per diem charges will assist understanding of the relationship between them and the Maine excise tax on railroads.

The practice of interchanging railroad freight cars instead of transferring loads at the end of each railroad's line became a requirement of law with the enactment of the Interstate Commerce Act in 1887. The result was that the freight cars of the nation "became in essence a single common pool, used by all roads", *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972), and each railroad boxcar owner was paid rent for the use of its cars by another railroad.

Because a critical boxcar shortage developed during World War I, Congress enacted the "Esch Car Service Act" of 1917, 40 Stat. 101, 49 U.S.C. § 1(14)(a). It empowered the Interstate Commerce Commission to establish per diem rental charges as *compensatory* charges; they presently consist of mileage and per diem rates varying with the cost and age of the boxcar. As regular rental charges, these per diem rates provide revenue which the collecting railroad may utilize for its expenses and general corporate purposes.

In 1966, confronting a persisting nation-wide boxcar shortage, Congress amended the Interstate Commerce Act to authorize the Commission to prescribe additional charges embodying such *incentive element as will*

“... in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.”²

By comprehensive regulations³ the Commission thereafter established “incentive per diem” charges: charges over and above the basic compensatory rental charges applicable to general service unequipped boxcars in the possession of non-owning railroads. As revenues received for car hire in excess of the costs or risks of ownership, the incentive per diem charges are intended to encourage railroads to acquire and maintain an adequate supply of freight cars.

Further to assist in this purpose, the regulations specifically restrict a railroad’s use of incentive per diem income to the purchasing, building, rebuilding, or leasing of boxcars and to the payment of state and federal *income* taxes attributable to incentive per diem income. With the

² Section 1 (14) (a), as amended by P.L. 89-430, 80 Stat. 168 (1966) and re-enacted by P.L. 94-210, 90 Stat. 46-47 (1976).

³ The regulations, originally set forth in Incentive Per Diem Charges—1968, Ex Parte No. 252 (Sub. No. 1), 337 I.C.C. 183 (1969), now codified at 49 C.F.R. Part 1036, have been sustained by the Courts, *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973), on remand, 368 F. Supp. 1009 (M.D. Fla. 1973), *aff’d per curiam*, 417 U.S. 901 (1974), and thus are deemed to have the force of law. *Public Utilities Commission of California v. United States*, 355 U.S. 534, 542, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958).

funds derived from incentive per diem charges thus earmarked and segregated, they are not available as general corporate funds from which the railroad can pay its liabilities, such as Maine’s excise tax on railroads.⁴

After expenditure by a railroad of the incentive per diem funds, the boxcars so acquired become part of the railroad’s general assets:—that is, earmarking of the incentive per diem funds restricts the railroad only up to and including the point of expenditure; thereafter the railroad owns the boxcars outright, even though the financial source represents revenue in excess of the ordinary rate of return.

The incentive per diem charge funds collected by the railroad must either be put to the intended use within eighteen months or be voluntarily surrendered to “Rail Box”, a corporation approved by the Interstate Commerce Commission and organized to acquire, own and lease a fleet of boxcars for use as a national boxcar pool. If a railroad which has not made timely use of the incentive funds fails to surrender them to Rail Box, the railroad becomes subject to investigation by the Interstate Commerce Commission.

III. INCLUSION OF INCENTIVE PER DIEM CHARGES IN NET RAILWAY OPERATING INCOME

As a threshold issue, we are asked to decide whether the concept of “net railway operating income,” as statutorily defined, requires the inclusion of incentive per diem charges in the computation of the Maine excise tax on railroads.

⁴ In addition, each carrier must acquire its “test period quota” of boxcars each year with general corporate funds before expending any incentive per diem funds. The quota, designed to prevent use of incentive funds for the ordinary purchase of car replacements, requires the railroad to purchase its annual average number of cars purchased, built or rebuilt in the five-year period from 1964 to 1968.

Maine Central contends that such inclusion of incentive per diem charges would be contrary to the Legislature's purpose in adopting the current definition of net railway operating income. As support for this position, Maine Central relies on the Legislature's adoption of the gross-net method of taxation in 1927, which, says Maine Central, reflects legislative intent that the excise tax be based strictly on the railroad's *ability-to-pay*. Maine Central argues that because the earmarking of the incentive per diem funds precludes use of the funds for general corporate purposes, such as payment of the railroad excise tax, inclusion of the restricted incentive per diem funds in the tax computation would increase the tax burden on general corporate assets and therefore is not consonant with the legislative approach predicated on *ability-to-pay*.

The argument is unconvincing.

As the excise tax on railroads was originally enacted in 1881 (P.L. 1881, Ch. 91), the rate of the excise tax increased with increase in the average gross transportation receipts per mile of track, and the amount of the tax was determined by multiplying the gross transportation receipts earned within the State by the tax rate. This led to the asserted inequity that even though a railroad continued to own substantially the same amount of property, it would nevertheless be liable for an increased amount of excise tax—as a function of the increased revenues deriving from increases in rate charges necessitated by higher operational expenses. These allegedly excessive tax burdens arose “not by reason of any increased prosperity” but rather as a result of increased revenues allowed by the Interstate Commerce Commission to defray corresponding increases in the costs of operation. See: Remarks of Representative Merrill, Legislative Record at 597, 83rd Maine Legislature (1927).

As a response to such inequities, the Legislature in 1927 adopted the current “gross-net method” (P.L. 1927, Ch. 27) under which the excise tax continues to be measured

by gross transportation receipts, but the rate of the tax is made to depend on the ratio of net railway operating income to gross transportation receipts.

Maine Central's claim is that inclusion of incentive per diem charges in the computation of net railway operating income would re-introduce the “mischief” which it was the Legislature's purpose to eliminate by the 1927 adoption of the gross-net method of excise taxation.

We cannot agree.

The function of the excise tax on railroads is to measure and tax the value of a railroad's franchise. Yet, pursuant to the approach prior to 1927, taxes resulted from correlative increases in expenses and rates without a corresponding increase in the prosperity of the railroad. Thus, taxes flowed from a distorted measurement of the value of the railroad franchise, and this was the “mischief” purported to be remedied by the Legislature's 1927 adoption of the gross-net methodology.

Such mischief—a distorted measurement of the value of the railroad franchise—does not result from including incentive per diem charges in net railway operating income. Although the excise tax burden enters as a cost factor, incentive per diem income constitutes a real addition to the operating income and prosperity of the railroad. Accordingly, insofar as the excise tax operates to measure and to tax the value of the railroad franchise, it is appropriate that the real increase in the value of the franchise occurring by virtue of the incentive per diem funds should be reflected in the railroad's excise tax liability—through the imposition of a higher tax rate on gross transportation receipts.

Maine Central errs, therefore, in characterizing the introduction in 1928 (in consequence of 1927 legislation) of the definition of net railway operating income as indicative of a legislative undertaking to build an *ability-to-pay*

mechanism into the excise tax. Proceeding from this error, Maine Central perpetrates the further error of inaccurately asserting that the inclusion in net railway operating income of per diem incentive revenues, which are not available for payment of general corporate expenses such as the excise tax, defeats the legislative objective that net railway operating income should provide the measure of a railroad's ability to pay the excise tax.

Maine Central also argues that the incentive per diem balances do not increase the profitability of the railroad collecting them because the incentive funds are "trust" monies. This is a loose use of the "trust" concept which confuses, rather than assists, correct analysis of the issue before us. It conceals the reality that the incentive per diem revenues do increase the total profit and value of creditor railroads to the extent that the incentive charges represent "compensation above and beyond the base costs of freight car ownership." *Illinois Terminal R.R. Co. v. United States*, 541 F.2d 201 (8th Cir. 1976). As revenue in excess of a fair rate of return, the incentive per diem charges enable a creditor railroad to receive an additional return on its current investments in cars in use on other lines without the burden of additional costs. True, the earmarking of funds for use to purchase, build, rebuild or lease unequipped general service boxcars might be some indication of a "trust" relationship. Yet, it is a strong indication to the contrary that the owning railroad is the primary beneficiary of the charges. For example, once the earmarked funds have been expended, plainly any "trust" status is lost; the cars become the outright property of the railroad. In addition, the new cars earn more mileage, as well as ordinary and incentive per diem revenues, and function as cost free additions to the railroad's hauling capacity.

In light of the history and purpose of the Maine Legislature's 1927 amendment, then, we conclude that the correct interpretation of 36 M.R.S.A. § 2624 is that, within the

Legislature's intendment, "net railway operating income" includes incentive per diem funds. This conclusion also finds support in the statutory language defining net railway operating income as "including in the computation thereof debits and credits arising from equipment rents." We see no reasonable alternative to holding that incentive per diem income constitutes a "credit" to a railroad arising from the equipment rent of its general service railroad boxcars.

IV. APPLICATION OF THE SUPREMACY CLAUSE

Having arrived at the statutory interpretation that net railway operating income includes incentive per diem charges for the purpose of the computation of the Maine excise tax on railroads, we turn to the question whether in this particular facet the statute becomes unconstitutional as violative of the Supremacy Clause of Article VI of the Constitution of the United States.⁵

Neither the Congress itself nor the Interstate Commerce Commission acting within the powers conferred upon it by Congress has expressly prohibited the State of Maine from requiring, for the purposes of computing the Maine excise tax on railroads, that the revenues from incentive per diem charges be included in net railway operating income. Hence, Maine Central's invoking the Supramacy Clause to prohibit such exercise of Maine's power of taxation must be taken as a claim that such result is mandated, here, by implication from the existence of the federal program in which incentive per diem charges serve an important function.

⁵ The Supremacy Clause reads:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

When the existence of a federal undertaking is thus asserted to deny, by implication, a State's exercise of powers normally possessed by it, the analysis becomes complex because of the relativity of the values at stake and the lack of any single generalized guiding principle. In *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941) the Court said:

"There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula."

With reference specifically to a claim that the Supremacy Clause mandates a denial in particular respects of a State's exercise of its power of taxation, the Court in *Penn Dairies v. Milk Control Commission of Pennsylvania*, 318 U.S. 261, 270-271, 63 S.Ct. 617, 87 L.Ed. 748 (1943) stressed the primacy of state taxing powers, asserting that the federal Constitution

"... presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes"

Further, in *Hines v. Davidowitz*, *supra*, the Court indicated that there must be greater play for the concurrent exercise by a state of such of its power as is "bottomed on the . . . broad base . . . [of] its power to tax." (312 U.S. at 68)

When therefore the claim is, as here, that the existence of a federal program impliedly demands an abridgment of Maine's exercise of its taxing power, the caveat of the Supreme Court of the United States in *Penn Dairies v. Milk Control Commission of Pennsylvania*, *supra*, has cogent applicability:

"[W]e should be slow to strike down legislation which the state concededly has power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of . . . [such] decision, while the national government which has the ultimate power, remains free to remove the burden." (318 U.S. at 275)

With this word of caution in mind we note, initially, that Maine's imposition of an excise tax on the value of a railroad franchise does not inherently, or necessarily, destroy, or directly conflict with, the federal incentive program and its purpose to alleviate the shortage in the national supply of boxcars. Seemingly acknowledging this point, Maine Central concentrates on the particular feature that Maine includes incentive per diem charges in net railway operating income, as an incident of the methodology by which the Maine excise tax on railroads is computed. It is this special factor, Maine Central argues, which creates serious potential for frustration of the federal incentive program.

We disagree.

Viewing the matter, first, relative to potential impact upon Maine Central as one individual railroad, we believe that despite Maine's inclusion of incentive per diem charges in net railway operating income, Maine Central will continue to have strong incentives to acquire additional boxcars with the use of its per diem incentive funds. Since the incentive per diem charges are charges in excess of the ordinary rate of return, the incentive funds increase the value of the franchise and produce an additional hauling capacity which, upon expenditure of the funds, becomes the

outright property of the railroad. The expenditure of incentive funds yields a further benefit to the railroad because the resulting additional car supply earns more mileage and ordinary per diem rates, as well as incentive per diem charges. By acquisition and expenditure of additional incentive funds, the railroad increases both its value and profitability.⁶ The burden of excise tax would have to reach very substantial proportions before Maine Central would find it necessary to forego the cost-free benefits of the incentive charges.

In large part Maine Central's argument to show "disincentive" consequences rests on a unique combination of circumstances which happened to result in 1974 in an imposition of the excise tax at a rate higher than the minimum rate. However, because incentive per diem charges as such are not taxed by the excise tax but, rather, are merely included in the computation by which the applicable rate becomes determined, an increase of incentive funds need not necessarily produce a greater excise tax liability. For example, in the years 1970 to 1973 the amount of Maine Central's excise tax liability to the State of Maine would not have changed if the incentive per diem charges had been excluded from net railway operating income. The year 1974 was unusual. Because Maine Central's earnings were the highest in its 112 year history, the excise tax rate increased from the minimum rate of $3\frac{1}{4}\%$ of the gross transportation receipts to the next level rate of $3\frac{3}{4}\%$. For 1975, Maine Central's tax returned to the minimum rate.⁷

⁶ In 1974, for example, Maine Central's boxcars earned an average of \$737 per general service unequipped boxcar, which resulted in an additional excise tax of \$197 per general service unequipped boxcar.

⁷ The rates are as follows: $3\frac{1}{4}\%$ when NROI (net railroad operating income) does not exceed 10% of GTR (gross transportation receipts); $3\frac{3}{4}\%$ when NROI is between 10 and 15% of GTR; $4\frac{1}{4}\%$ when NROI is between 15 and 20% of GTR; $4\frac{3}{4}\%$ when NROI is between 20 and 25% of GTR; and $5\frac{1}{4}\%$ when NROI exceeds 25% of GTR.

Maine Central's excise tax rate for 1974 also happened to reflect the special fact that there was at that time a higher rate of incentive per diem charges authorized by the Interstate Commerce Commission. As originally promulgated, incentive charges were imposed on a 6 month basis from September to February each year. Effective May 1, 1973, during the Russian wheat sales, the Commission extended the incentive charges to a year round basis. As based on these rates, therefore, the additional incentive per diem charges, representing a return beyond the 6% ordinary rate of return, equalled 6% annually from 1970 to 1972, approximately 10% in 1973, 12% in 1974 and 1975, and 6% thereafter. See: Incentive Per Diem Charges—1968, 337 I.C.C. 217, 225, 246 (1970) and Incentive Per Diem Charges—1968, 350 I.C.C. 473 (1975). Since the Commission indefinitely cut incentive charges in half (back to 6%) effective September 15, 1975, it would appear for the future that Maine Central can continue to acquire and expend greater amounts of incentive funds without exceeding the minimum rate of taxation, at least in the absence of another record breaking year of income earnings.⁸

Maine Central argues that the inclusion of incentive per diem charges within net railway operating income will frustrate the federal incentive program because it will

⁸ The ICC eliminated year round application of the incentive, believing that continuation could not "be justified because of the present surplus of unequipped general service boxcars." The Commission continued the 6 month rate, however, deeming the supply of boxcars still inadequate because of the decline in their ownership and the temporary decline in demand.

Maine Central also argues that it had insufficient funds in 1975 with which to pay the tax imposed for 1974. This difficulty merely reflects inadequate planning by the railroad. Maine Central's 1974 balance reflects \$1,004,105 in unrestricted ordinary income available for general corporate purposes and expenses, including payment of the additional \$615,000 in excise tax. In addition, other funds available for payment of the excise tax included \$3,569,207 in extraordinary income from the sale of the Mattawamkeag to Vanceboro line in 1974.

result in an excise tax burden on general corporate assets likely to leave insufficient general funds from which Maine Central can meet the basic test period quota (discussed in n.4, *supra*)—a quota which the railroad must acquire with general assets before it may utilize the segregated incentive funds. In addition to doubts we entertain that the test period quota has the severity Maine Central purports to attribute to it,⁹ we believe that appropriate use of its financial planning resources will enable Maine Central readily to compute the level at which generation of additional incentive charges will excessively burden general corporate assets.

While there could be a point at which, because of an unlimited increase in incentive funds, the excise tax burden on general corporate funds could be so heavy as to eliminate further incentive for, or ability of, an *individual* railroad to acquire additional boxcars, this cannot be dispositive in the determination of whether the *national* incentive program will be frustrated. Indeed, it is an infirmity of Maine Central's argument that it would relate the incentive program *exclusively* to the resulting financial impact on an individual railroad and its financial incentive to acquire additional boxcars. Maine Central thus ignores the underlying nature and purpose of the federal boxcar program. Acquisition of additional boxcars by *individual* owning railroads represents only one alternative mechanism for the achievement of the federal goal of an adequate *national* supply of boxcars. Even on the assumption that the excise tax could produce adverse consequences for Maine Central which might destroy incentive for Maine Central to acquire additional boxcars, the federal regulations still require that every dollar of incentive per diem funds available after income tax payments be spent on the acquisition and maintenance of additional boxcars. The

⁹ See: The Freight Car Shortage and ICC Regulation, 85 Harv. L. Rev. 1583 (1972).

ICC regulations specifically anticipate, and deal with the prospect, that individual railroads will refuse to spend incentive funds on additional boxcars. In such situation the regulations approve, and by imposition of certain investigative procedures mandate, the transfer of unused earmarked incentive funds to Rail Box. 49 C.F.R. § 1036.4. Thus, the existence of Rail Box, as a corporation organized to acquire, own and lease a fleet of boxcars, guarantees expenditure of the federal incentive funds without the danger of frustration of the *national* program by the actions of *individual* railroads.¹⁰

The underlying fallacy of Maine Central's argument is that it assumes as realistic financial possibilities only those lying at the two end-poles of a continuum of financial possibilities. Maine Central projects that either (1) incremental increases in the excise tax rate will destroy *all* incentive of a railroad to acquire additional boxcars; or (2) at the opposite pole, the incentive funds generated by the railroad will be of so great a magnitude that the resulting increase in the level of excise tax liability will destroy *the ability* of the railroad to meet its basic acquisition quota from its general funds.

¹⁰ The overall scheme of the federal incentive charge program indicates its purpose to increase the national supply of boxcars without regard to distribution of ownership by *individual* railroads. (In fact, railroads which do not own boxcars receive no help by the incentive program; only owning railroads receive additional revenue from the incentive charges). Since the boxcar shortage arose as a result of the interchange of railroad freight cars at the end of each railroad's line, the incentive program, to the extent it relies on acquisition of additional boxcars by individual railroads, will be successful only so long as the incentive charges remain in effect. In contrast, acquisition of additional boxcars by Rail Box, as a corporation dedicated solely to the acquisition and maintenance of an adequate supply of boxcars, may in fact improve the supply and efficiency of the boxcar pool by direct recognition of the existence of a "national pool of boxcars."

We are not persuaded by this analysis because we find it artificially extreme. It overlooks the reality that railroads engage in financial planning and can devise strategies, in relation to possible excise tax liabilities, which will tend to prevent the occurrence of the above-described extreme situations. Through planning railroads can place themselves in intermediate financial postures tending to protect general corporate assets while simultaneously permitting enjoyment of the benefits to be derived from participation in the federal boxcar incentive program.¹¹

The existence, and functioning, of Rail Box further indicates that the manner of Maine's imposition of its excise tax on railroads need not unduly interfere with the federal program of generating a nation-wide acquisition of a substantial number of additional boxcars. In the circumstances when the tax might begin to operate as a disincentive to certain marginal or incremental additional boxcar acquisitions, the requirement for surrender of the funds to Rail Box will work toward achieving complete expenditure of the funds, thus to produce an optimal increase in the national supply of boxcars.

On the basis of the foregoing analysis we are satisfied that Maine's inclusion of incentive per diem charges in net railway operating income, for the computation of the Maine excise tax on railroads, has no direct, generalized tendency to affect the federal boxcar incentive program

¹¹ The agreed statement of facts contains the depositions of two witnesses, the President of Maine Central and a Cost Analyst of the ICC. The parties agreed that the testimony contained in the depositions is the testimony that the witnesses "would give . . . if under oath and present and testifying." Both witnesses suggested that inclusion of the incentive funds in the computation of the Maine excise tax would create an adverse impact on the federal incentive program. However, we are free to evaluate and to disregard the testimony and conclusions of these witnesses and to draw such factual inferences and legal conclusions as warranted by the report of the entire case to this Court.

so adversely as to require, by force of the Supremacy Clause of the Constitution of the United States, the nullification of that particular exercise of Maine's power of taxation *by implication* from the existence, and needs, of the Federal program.¹²

V. THE COMMERCE CLAUSE

As an alternative constitutional attack, Maine Central maintains that the formula for apportionment of net railway operating income, as applied when incentive per diem charges are included in net railway operating income, becomes violative of the Commerce Clause (Section 8 of Article I) of the Constitution of the United States.

¹² The ICC regulations allowing payment of income taxes attributable to the incentive charges do not require a contrary result. While the ICC's allowing payment of income tax from the restricted funds may evidence intent to prevent imposition of additional income tax burden on general corporate funds as a result of the incentive charges, it nevertheless also indicates that such tax burdens as flow from an income tax on the restricted funds are not deemed to impair the federal program. In similar vein, the ICC could see fit to allow a deduction from the incentive fund for the payment of State excise taxes. That the ICC has not yet seen fit to allow any such deductions or payment from the restricted incentive funds suggests to us, objectively, that any other liabilities resulting from the incentive fund are deemed to be an acceptable burden on general corporate funds. In fact, in a 1973 report on the incentive program, the ICC expressly recognized that the incentive funds would create certain liabilities on the railroad corporation for which no general funds existed, and that this would not frustrate the federal incentive program. In response to a question concerning a carrier which became liable for payment of contingent interest and bond sinking fund contributions, because of bond indenture requirements resulting from inclusion of incentive per diem in an ordinary income, the ICC answered:

"Regardless of the fact that by including incentive per diem in ordinary income an interest liability is created for which there are no funds available, current accounting rules require that all car per diem income must be recorded in the ordinary income account." See: Incentive Per Diem Charges—1968, 343 I.C.C. 55 (1973) (informal answer to question 8).

To avoid violation of the Commerce Clause, in general, the Maine railroad excise tax utilizes an apportionment formula to determine the in-state elements of the gross transportation receipts and net railway operating income of the railroads engaged in interstate operations. The formula is stated as follows:

"The gross transportation receipts of such [an interstate] railroad, line or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated to obtain the average gross transportation receipts per mile, and the gross transportation receipts in the State shall be taken to be the average gross transportation receipts per mile multiplied by the number of miles operated within the State, and the net railway operating income within the State shall be similarly determined." (36 M.R.S.A. § 2624)

Maine Central's contention is that this formula, regardless of whether it may generally operate to protect against Commerce Clause violation, produces a contravention of the Commerce Clause in the particular circumstances, as here, in which incentive per diem charges are included in net railway operating income for purposes of computing the railroad excise tax. Maine Central points out that 765 miles of its total of 908 miles of track are located in Maine. In light of this fact the inclusion of incentive per diem charges in net railway operating income produces the result, says Maine Central, that application of the apportionment formula attributes to the State of Maine 84.25% of the net freight car rental charges and net incentive per diem charges even though, in 1974, less than 3% of Maine Central's freight car rental charges and incentive per diem charges came from boxcar rentals within Maine.

The cases of *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662-663, 68 S.Ct. 1260, 92 L.Ed. 1633, 1641 (1948) and *Gwin, White & Prince, Inc. v. Henneford*, 305

U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272 (1939) on which Maine Central relies to support its argument are distinguishable. These cases stand for the proposition that an *unapportioned* tax on, or measured by, the gross receipts of an interstate corporation violates the Commerce Clause. But the tax here is not *unapportioned*; an apportionment formula is utilized. Maine Central's claim is that the formula results in improper apportionment allocations. However, that a formula may produce a mathematically inexact apportionment does not per se establish a violation of the Commerce Clause; rough approximation, as a practical matter, is the norm of any state taxation system. *Illinois Central R.R. Co. v. Minnesota*, 309 U.S. 157, 161, 60 S.Ct. 419, 84 L.Ed. 670 (1940). In addition, the party attacking the apportionment formula carries the distinct burden of proving by "clear and cogent evidence" that it results in taxation of extraterritorial values. *Butler Brothers v. McCollum*, 315 U.S. 501, 507, 62 S.Ct. 701, 86 L.Ed. 991 (1942). Indeed, as further explained in *Central Greyhound Lines, Inc. v. Mealey*, supra, one of the primary cases on which Maine Central relies,

"[T]he tax may constitutionally be sustained on the receipts from the transportation apportioned as to the mileage within the State." (334 U.S. at 663)

See also: *Canton R.R. Co. v. Rogan*, 340 U.S. 511, 515-516, 71 S.Ct. 447, 95 L.Ed. 448 (1951) (approval of railroad mileage apportionment formula).

A prior version of the present Maine excise tax was sustained by the United States Supreme Court over a Commerce Clause attack in *Maine v. Grand Trunk Railway Co.*, 142 U.S. 217, 12 S.Ct. 121, 35 L.Ed. 994 (1891). *Grand Trunk*, an authority not challenged by Maine Central, upheld the 1881 version of the excise tax which imposed a franchise tax measured solely by the gross receipts of the railroad and apportioned by a mileage for-

mula almost identical to that of the present tax. We understand Maine Central to be claiming here, that *Grand Trunk* loses its precedential force in the face of the allegedly distinguishing circumstance that incentive per diem charges are made an additional element of net railway operating income for purposes of computation of the rate of excise tax.

In our view, however, *Grand Trunk* becomes distinguishable neither in result nor rationale by the presence of this additional factor. *Grand Trunk* carefully explained that the Maine tax was apportioned according to the *value of the railroad franchise*. The levy was not on gross transportation receipts; rather, gross transportation receipts constituted the means of ascertaining the value of the privileges conferred. 142 U.S. at 228, 230. As subsequently explained in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031 (1908), the Maine statute, significantly, taxed only the value of the franchise, and this was taxed as property in lieu of certain local ad valorem property taxes rather than as receipts of transportation. Characterizing the systemic scheme of the Maine excise tax on railroads, the *Galveston* Court said:

"The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. . . . The excise was an attempt to reach that additional value." (210 U.S. at 226)

It is of prime importance here, then, that the present excise tax continues the identical scheme embodied in the 1881 statute, by operating in lieu of local property taxes on the value of the franchise. See also: *Railway Express*

Agency, Inc. v. Virginia, 358 U.S. 434, 444, 79 S.Ct. 411, 3 L.Ed.2d 450 (1959); *Illinois Central R.R. Co. v. Minnesota*, 309 U.S. 157, 60 S.Ct. 419, 84 L.Ed. 670 (1940); *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 38 S.Ct. 373, 62 L.Ed. 827 (1918); and *United States Express Co. v. Minnesota*, 223 U.S. 335, 32 S.Ct. 211, 56 L.Ed. 459 (1912). As the *Galveston* case, *supra*, explained, the validity of a franchise tax, insofar as it is a tax upon the property value of the railroad's franchise as augmented by the value of the railroad's interstate commerce, depends on consideration of the value of the *entire franchise* including therein its interstate operations; and the resort to trackage as the basis on which the apportionment formula rests may be taken as "a measure of the value of the property per mile." (emphasis supplied) (210 U.S. at 226)¹³ We find unpersuasive, therefore, Maine Central's argument that the validity of the apportionment formula, as here applied, is to be assessed by considering income from freight rentals *in isolation from the totality* of the railroad's operating income.

The 1927 addition of net railway operating income as a factor in the rate computation modifies the tax in a manner solidifying its status as a franchise tax. A tax measured in part by net income more accurately reflects the value of the franchise than a tax measured solely by gross receipts. See: *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135 (1918). Accordingly, the 1927 amendment presently in effect insulates the

¹³ *Galveston* stressed that the State has the right to tax the franchise, as property, "at its actual value as a going concern." (emphasis supplied) (210 U.S. at 227) Further explaining, the Court said: "As the property of companies engaged in such commerce . . . may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged." (210 U.S. at 225)

tax, even beyond the protection afforded by the approval in *Grand Trunk*, from attack as a gross receipts tax on interstate commerce.

"The Court long since ha[s] recognized that interstate commerce may be made to pay its way." *Complete Auto Transit, Inc. v. Brady*, —U.S.—, 97 S.Ct. —, 51 L.Ed.2d 326, 334 (1977)

The inclusion of per diem incentive charges in net railway operating income does not cause a malapportionment violative of the Commerce Clause of the Constitution of the United States.

VI. THE COUNTERCLAIM OF DEFENDANT

Plaintiff's reply to defendant's counterclaim raises no issues beyond those above considered. The effect of the pleadings is thus to establish that in the event this Court should rule against plaintiff Maine Central on its statutory interpretation and constitutional contentions, as the Court has herein ruled, plaintiff concedes its liability for the 1974 railroad excise tax in the amounts asserted in the counterclaim of defendant State Tax Assessor.

The entry is:

- (1) It is adjudicated: (a) correctly interpreted, 36 M.R.S.A. § 2624 requires for purposes of the computation of the Maine excise tax on railroads, that incentive per diem charges be included in net railway operating income; (b) thus interpreted, 36 M.R.S.A. § 2624 violates neither the Supremacy Clause of Article VI nor the Commerce Clause (Section 8 of Article I) of the Constitution of the United States;
- (2) the case is remanded to the Superior Court with directions that said Court order (a) as to plaintiff's complaint, that judgment be en-

tered in favor of the defendants; and (b) as to the counterclaim of defendant State Tax Assessor, that judgment be entered for defendant State Tax Assessor in the amounts sought by the counterclaim.

Pomeroy, J., did not sit.

DUFRESNE, A.R.J. sat at oral argument as Chief Justice, but retired prior to the preparation of the opinion. He has joined the opinion as Active Retired Justice.

Wernick, Archibald, Delahanty, Godfrey J. J. and Dufresne, A. R. J. Concurring.

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**Opinion of the Supreme Judicial Court of Maine on
Reconsideration**

Reporter of Decisions
Decision No. 1584
Law Docket No. Ken-77-14

Date Opinion Filed
December 27, 1977

MAINE CENTRAL RAILROAD COMPANY

v.

RAYMOND L. HALPERIN, et al

WERNICK, J.

On motion for reconsideration.

Plaintiff Maine Central has moved for reconsideration of the Court's November 16, 1977 opinion in this case. Maine Central's motion asks us to address the issue

"whether the imposition of the Maine Railroad Excise Tax under the specific circumstances affecting Maine Central's 'net railway operating income' in 1974 contravened the Commerce [Clause]"

Maine Central suggests that this question became obscured, inadvertently, in the attention concentrated on the broader argument that it is facially unconstitutional to include incentive per diem income in the "net railway operating income" used to compute the excise tax on railroads. Although we are satisfied that in its fundamental import our original opinion sufficiently covered the "as applied" issue now being raised, in the interest of full clarity we deem it appropriate to add a clarifying supplement. It is true that in our original opinion we gave extensive consideration to the "unique combination of circumstances" which occurred in 1974 in arriving at our decision reviewing Maine Central's challenge predi-

cated on the Supremacy Clause of the Constitution of the United States, a decision which Maine Central has not asked us to reconsider.¹ We did not, however, ignore the 1974 circumstances in addressing the Commerce Clause question. On that issue the purport of our decision was that even in relation to the special circumstances of 1974, the application of the mileage apportionment formula to net railway operating income did not contravene the Commerce Clause.

In Part II of its motion Maine Central relies on *Norfolk & Western Ry. Co. v. Missouri State Tax Commission*, 390 U.S. 317 (1968) to support the contention that the excise tax as applied in 1974 violated the Commerce Clause. In the *Norfolk* case, the Supreme Court ruled that

"when a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in its particular case, the State is obligated to counter that evidence or to make the accommodations necessary to assure that its taxing power is confined to its constitutional limits. If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail." (p. 329)

We reiterate our original conclusion that the taxpayer has not met its burden of proving that the mileage formula will yield a "grossly distorted" result.

The alleged "evidence" of distortion is that in the special 1974 situation the effect of the imposition of the

¹ Our original opinion ruled that the Maine Excise Tax even as applied to Maine Central in 1974 would not frustrate the incentive of Maine Central to participate extensively in the federal program and that any disincentives created by the tax would be overcome by the expenditure of the incentive funds by Rail Box in furtherance of the federal purpose of increasing the national supply of railroad boxcars.

Maine excise tax was to attribute to the State of Maine 84.25% of Maine Central's net freight car rental and incentive per diem charges when in fact only 2.62% of these receipts had been earned as the rentals from cars used in Maine. The error of this approach lies in the error of its premise, that each component of the value of the railroad franchise may be broken down and examined separately to determine whether the tax is properly apportioned as to that particular component of the value of the railroad franchise.

In this regard, contrary to Maine Central's contention, the distinction between the Maine Excise Tax on Railroads and a tax such as the ad valorem tax in *Norfolk & Western*, supra, becomes of primary importance. In *Norfolk & Western*, Missouri had imposed an ad valorem tax on "all real property . . . [and] tangible personal property" owned, hired or leased by any railroad company "in this state." Application of Missouri's mileage apportionment formula to a foreign railroad corporation resulted in a determination that 8% of the railroad's rolling stock was located in Missouri. Direct evidence, however, established that on tax day (and generally throughout the year in approximately the same proportions) only 2.71% of the total fleet of rolling stock was located in Missouri. The *Norfolk* Court rejected Missouri's attempt to uphold the tax on the basis of the enhancement or augmentation in value of the *tangible* property produced by its connection with, and organic relation to, the integrated railroad system. The tax was thus held to violate the Commerce Clause because it was imposed on tangible property not located in the state. In the instant case, in contrast, the tax does not fall on property outside of the state but rather is imposed on the value of the local railroad franchise as apportioned and measured by net railway operating income and gross transportation receipts throughout the entire railroad system.

In an ad valorem tax system, although the augmentation in value attributed to the existence of tangible property as part of a going concern is a relevant factor in valuing the individual units of tangible property located in the state, the validity of the apportionment may be broken down to individual units such as the value of the rolling stock and the value of terminal facilities. However, as we pointed out in our original opinion, the apportionment of an excise tax on a railroad franchise presents a distinguishable situation. The excise tax is imposed on the value of the local franchise valued as a going concern "in its organic relations, and not merely as a congeries of unrelated items . . ." (*Galveston* cited in n. 13). In short, with respect to the apportionment of an excise tax, it is improper to consider the validity of the apportionment as it relates to component parts of the value of the railroad franchise such as rental and incentive per diem income because the tax is not imposed on those items. Instead, a proper evaluation of the apportionment formula requires valuation of the entire franchise as a going concern. The difference in the method of apportionment results from the subject of the tax. An ad valorem tax is imposed on tangible property; the percentage attributable to each state and the value of that property even as a part of a unitary system can largely be determined separately for each individual type of property. The property value of the railroad franchise, however, can only be determined as a whole by looking first to the entire franchise and then attempting to apportion to the taxing state a fair share of that value.

Although we recognize that *Complete Auto Transit Inc. v. Brady*, — U.S. — (1977) abrogated artificial distinctions between a "privilege" and a "franchise" tax, we believe that here the distinction between a franchise tax and an income or ad valorem property tax retains significant substantive meaning in relation to the appropriate method of valuation and apportionment. Hence, we re-

iterate the conclusion of our original opinion, that we find unpersuasive Maine Central's argument that the validity of the apportionment formula, as here applied, is to be assessed by considering income from freight rentals in isolation from the totality of the railroad's operating income.

We do not forget that in the valuation of the local franchise of a railroad corporation the railroad's property located in another state can be taken into account only if

"it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State." *Wallace v. Hines*, 253 U.S. 66, 69 (1920) *

The basic rental and incentive charges here clearly add to the value of the railroad franchise in the State of incorporation and the major place of doing business. Because the interchange of railroad boxcars is mandatory, the value of the local railroad franchise is not limited to the value of property and privileges located at the situs of the railroad's trackage. The interchange of boxcars and the contracts executed pursuant thereto which provide for the incentive and basic rental charges increase the value of the local railroad franchise by enabling the railroad to participate in and receive the benefits of the "single common pool" of railroad boxcars. Moreover, the

* *Wallace* was cited in the *Norfolk & Western* case on which Maine Central relies. *Wallace* involved a tax on a foreign corporation, whereas the instant tax is on a domestic corporation. In *Wallace*, the special excise tax was invalidated because most of the major terminals (and thus most of the railroad's value) were located in other states even though a large amount of the railroad's trackage was in the taxing state. Here, in addition to the value of the benefits and protections accorded by Maine as the state of incorporation, no evidence in the record suggests other than that the major part of value of the entire railroad franchise is located in the State of Maine.

basic rental charges, in fact, immediately become part of the railroad's general corporate assets and the incentive income becomes part of general corporate assets when transformed by expenditure on additional boxcars. Thus, in light of the mandatory interchange of boxcars and the *significant financial benefits to the railroad even after it pays the costs of the excise tax*, we conclude, as before, that the taxpayer has not sustained its burden of proving that an excessive burden on interstate commerce resulted in 1974 from application of the Maine excise tax.

In *Maine v. Grand Trunk Railway Co.*, 142 U.S. 217 (1891), the United States Supreme Court upheld a prior version of the present Maine excise tax. In *Western Live Stock v. Bureau*, 303 U.S. 250, 256 (1938), *Grand Trunk* was cited with apparent approval as upholding a fairly apportioned tax on the value of the local privilege or franchise as measured by gross receipts from interstate commerce. We believe that *Grand Trunk* remains viable authority justifying us in upholding the same mileage apportionment formula in its application to the circumstances presently before us. As we observed in our original opinion, the 1927 addition of net railway operating income as a factor in rate computation results in an even more accurate reflection of the value of the railroad franchise.

The entry is:

- (A) The stay of proceedings in the Superior Court ordered by this Court on December 7, 1977 pending this Court's consideration of the motion for reconsideration is lifted;
- (B) This Court's prior entry of adjudication is reaffirmed and supplemented to read as follows:
 - (1) It is adjudicated: (a) correctly interpreted 36 M.R.S.A. § 2624 requires, for purposes of the computation of the Maine excise tax on

railroads, that incentive per diem charges be included in net railway operating income; (b) thus interpreted, 36 M.R.S.A. § 2624, taken facially as well as in its application to the circumstances of the present case, violates neither the Supremacy Clause of Article VI nor the Commerce Clause (Section 8 of Article I) of the Constitution of the United States;

- (C) The case is remanded to the Superior Court with directions that said Court order (a) as to plaintiff's complaint, that judgment be entered in favor of the defendants; and (b) as to the counterclaim of defendant State Tax Assessor, that judgment be entered for defendant State Tax Assessor in the amounts sought by the counterclaim.

Pomeroy, J., ~~did~~ not participate.

Delahanty, J., did not participate in the consideration of the motion for reconsideration.

Dufresne, A.R.J., who sat at oral argument as Chief Justice and joined in the original opinion as Active Retired Justice, has joined in this opinion as Active Retired Justice.

Archibald, Godfrey, J. J., and Dufresne, A.R.J. concurring.

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Order of the Superior Court Entering Judgment

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
Civil Action
Docket No. 75-927

MAINE CENTRAL RAILROAD COMPANY, *Plaintiff*

v.

RAYMOND L. HALPERIN, ET AL., *Defendants*

(RECEIVED AND FILED DECEMBER 30, 1977)

This action having been reported to the Law Court by order of this court dated December 22, 1976 and the Law Court having remanded the case by order dated November 16, 1977 to this court with directions for entry of judgment, having stayed further proceedings of this court by order dated December 7, 1977, and, upon reconsideration of its adjudication, having lifted said stay by order dated December 27, 1977,

And, the amount sought by the counterclaim of the State Tax Assessor being correctly computed as follows:

Assessment	\$686,382.99
Less: Payment prior to filing of complaint (6/15/75)	23,541.40
Principal sought in counterclaim	\$662,841.59
Less: Payments during pendency of action (9/15 and 12/15/75)	47,082.76
Principal currently due	<u>\$615,758.83</u>
Interest @ 10% per year:	
On \$205,252.93 for 2 years and 198 days (6/15/75 to 12/30/77)	\$52,184.85
On \$205,252.93 for 2 years and 106 days (9/15/75 to 12/30/77)	47,011.35
On \$205,252.97 for 2 years and 15 days (12/15/75 to 12/30/77)	41,894.09
	<u>141,090.29</u>
	<u><u>\$756,849.12</u></u>

It is ORDERED (a) as to plaintiff's complaint, that judgment be entered in favor of defendants, and (b) as to the counterclaim of defendant State Tax Assessor, that judgment be entered for defendant State Tax Assessor in the amount of \$756,849.12.

/s/ LEWIS I. NAIMAN
Justice, Superior Court

Dated: December 30, 1977

Notice of Appeal to the Supreme Court of the United States

[Filed: January 13, 1978]

STATE OF MAINE
KENNEBEC, SS

SUPERIOR COURT
Civil Action
Docket No. 75-927

Law Court
Docket No. KEN-77-14

MAINE CENTRAL RAILROAD COMPANY, *Plaintiff*

v.

RAYMOND L. HALPERIN, ET AL., *Defendants*

PLEASE TAKE NOTICE that Maine Central Railroad Company hereby appeals to the Supreme Court of the United States the final judgment entered by the Supreme Judicial Court of Maine in this action on December 27, 1977. The appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

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(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

Maine Railroad Excise Tax

CHAPTER 361

RAILROAD COMPANIES

§ 2621. Annual returns

Every railroad company incorporated under the laws of the State or doing business therein shall annually, between the first and 15th days of April, return to the State Tax Assessor, signed by its treasurer or its chief accounting officer, a statement of the gross transportation receipts, the net railway operating income, the average number of miles operated in the system and the average number of miles operated in the State for the preceding calendar year.

§ 2622. Penalties

Any corporation, company or person willfully neglecting to make returns as provided in section 2621 forfeits \$5 for every day's neglect, to be recovered by a civil action in the name of the State. Any officer, agent or employee of such railroad company who willfully violates any provision of section 2621 shall be punished by a fine of not less than \$100 nor more than \$500 for each offense, to be recovered by indictment to the use of the State.

§ 2623. Excise tax: payment to cities and towns one percent on stock held therein

Every corporation, person or association operating any railroad in the State under lease or otherwise shall pay to the State Tax Assessor, for the use of the State, an annual excise tax for the privilege of exercising its franchises and the franchises of its leased roads in the State, which, with the tax provided for in section 561, is in place of all taxes upon the property of such railroad.

§ 2624. Amount of tax

The amount of the annual excise tax on railroads shall be ascertained as follows: The amount of the gross transportation receipts as returned to the Public Utilities Commission for the year ended on the 31st day of December preceding the levying of such tax shall be compared with the net railway operating income for that year as returned to the Public Utilities Commission. When the net railway operating income does not exceed 10% of the gross transportation receipts, the tax shall be an amount equal to $3\frac{1}{4}\%$ of such gross transportation receipts. When the net railway operating income exceeds 10% of the gross transportation receipts but does not exceed 15%, the tax shall be an amount equal to $3\frac{3}{4}\%$ of the gross transportation receipts. When the net railway operating income exceeds 15% of the gross transportation receipts but does not exceed 20%, the tax shall be an amount equal to $4\frac{1}{4}\%$ of such gross transportation receipts. When the net railway operating income exceeds 20% of the gross transportation receipts but does not exceed 25%, the tax shall be an amount equal to $4\frac{3}{4}\%$ of such gross transportation receipts. When the net railway operating income exceeds 25% of the gross transportation receipts, the tax shall be an amount equal to $5\frac{1}{4}\%$ of such gross transportation receipts. When net railway operating income for the preceding year is less than $5\frac{3}{4}\%$ of investment in railway property used in transportation service, less depreciation and plus cash, including temporary cash investments and special deposits, and material and supplies, as reported by the railroad in its annual report to the Public Utilities Commission, the tax payable shall be diminished by a sum which added to said net railway operating income would equal $5\frac{3}{4}\%$ of the investment as aforesaid; except that in any event the tax payable shall not be diminished below a minimum amount equal to 1% of the gross transportation receipts for the year 1971 and equal to $\frac{9}{10}$ of 1% of the gross transportation receipts for the year 1972 and

equal to $\frac{1}{4}$ of 1% of the gross transportation receipts for each succeeding year. In the case of railroads operating not over 50 miles of road, the tax shall not exceed $1\frac{3}{4}\%$ of the gross transportation receipts.

When a railroad lies partly within and partly without the State, or is operated as a part of a line or system extending beyond the State, the tax shall be equal to the same proportion of the gross transportation receipts in the State, and its amount shall be determined as follows: The gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated to obtain the average gross transportation receipts per mile, and the gross transportation receipts in the State shall be taken to be the average gross transportation receipts per mile multiplied by the number of miles operated within the State, and the net railway operating income within the State shall be similarly determined.

The term "net railway operating income" means the railway operating revenues less the railway operating expenses, tax accruals and uncollectible railway revenues, including in the computation thereof debits and credits arising from equipment rents and joint facility rents. The Public Utilities Commission, after notice and hearing, may determine the accuracy of any returns required of any railroad, and if found inaccurate, may order proper corrections to be made therein.

§ 2625. Determination of tax; notice to companies

The State Tax Assessor, on the first day of each May, shall determine the amount of the tax on railroad companies and shall forthwith give notice thereof to the corporation, person or association upon which the tax is levied.

§ 2626. Due date: payment to State Tax Assessor

The tax on railroad companies shall be payable 1/3 on the 15th day of June next after the levy is made, 1/3 on the 15th day of September and 1/3 on the 15th day of December next following. Such tax shall be payable to the State Tax Assessor, who shall pay over all receipts from such tax to the Treasurer of State daily.

§ 2627. Abatement

Any corporation, person or association aggrieved by the action of the State Tax Assessor in determining the tax on railroad companies, through error or mistake in calculating the same, may apply for abatement of any such excessive tax within the year for which such tax is assessed, and if, upon rehearing and reexamination, the tax appears to be excessive through such error or mistake, the said State Tax Assessor may thereupon abate such excess. The amount so abated shall be deducted from any tax due and unpaid upon the railroad upon which the excessive tax was assessed; or, if there is no such unpaid tax, the State Controller shall draw a warrant for the abatement, to be paid from any money in the treasury not otherwise appropriated.

§ 2628. Further returns: access to books by Public Utilities Commission

If the returns required by law in relation to railroads are found insufficient to furnish the basis upon which the tax on railroads is to be levied, the Public Utilities Commission shall require such additional facts in the returns as may be found necessary. Until such returns are so required, or, in default of such returns when required, the State Tax Assessor shall act upon the best information that he may obtain. The Public Utilities Commission shall have access to the books of railroad companies to ascertain if the required returns are correctly made. Any railroad corporation, association or person operating any rail-

road in the State, which refuses or neglects to make returns required by law or to exhibit to the Public Utilities Commission its books for the purposes aforesaid, or makes returns which the president, clerk, treasurer or other person certifying to such returns knows to be false forfeits not less than \$1,000 nor more than \$10,000, to be recovered by indictment or by a civil action in any county into which the railroad operated extends.

*Interstate Commerce Act, Section 1, (14) (a) as amended by Pub. L. 89-430 (eff. Sept., 1966) with material added by Pub. L. 89-430 italicized.**

§ 1, par. (14). Establishment by Commission of rules, etc., as to car service

(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. *In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining*

* Section 1(14)(a) was further amended by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, in respects not relevant to this case.

such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Incentive Per Diem Regulations*

PART 1036—INCENTIVE PER DIEM CHARGES ON BOXCARS

Sec.

- 1036.1 Application.
- 1036.2 Amount of incentive charge.
- 1036.3 Earmarking.
- 1036.4 Use of funds.
- 1036.5 Effective date.
- 1036.6 Rules and regulations suspended.

AUTHORITY: The provisions of this Part 1036 issued under secs. 1 and 12 of the Interstate Commerce Act, 24 Stat. 379, 383, as amended; 49 U.S.C. 1, 12.

SOURCE: The provisions of this Part 1036 appear at 35 F.R. 7122, May 6, 1970, unless otherwise noted.

* Regulations in effect as of December 31, 1976, as contained in the most recent edition of the Code of Federal Regulations. Because of certain technical amendments, the regulations in effect during 1974 and 1975 (see R. 174-76) differed in respects not material to this case.

§ 1036.1 Application.

Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads, including the owning railroads of Canada, the additional per diem charges set forth in § 1036.2 on all boxcars shown below,

<i>Mechanical designation</i>	<i>Code number</i>
XM	B100-109, B200-209, B300-309.
XMI	B110-119, B210-219, B310-319.
XMIH	B120-129, B220-229, B320-329.
VA	B040.
VM	B050.
XC	B060.
XCI	B070.
XU	B080.

while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed Mexican-owned cars are exempt from the operation of these rules. The rules of this part shall apply regardless of whether the foregoing boxcars are in intrastate, interstate, or foreign commerce.

[35 F.R. 7122, May 6, 1970, as amended at 36 F.R. 13997, July 29, 1971]

§ 1036.2 Amount of incentive charge.

The incentive charges applicable in each cost bracket by age group are set forth below:

AMOUNT OF INCENTIVE PER DIEM ON BOXCARS (COLLECTIBLE IN 6 MONTHS IN EACH YEAR)

Line No.	Cost bracket	Group A 0-5 years	Group B 6-10 years	Group C 11-15 years	Group D 16-20 years	Group E 21-25 years	Group F 26-30 years	Group G over 30 years
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1	0-\$1,000	\$0.32	\$0.27	\$0.22	\$0.17	\$0.11	\$0.06	\$0.04
2	\$1,000-\$3,00065	.54	.44	.33	.23	.12	.07
3	\$3,000-\$5,000	1.30	1.09	.88	.67	.46	.25	.14
4	\$5,000-\$7,000	1.95	1.63	1.32	1.00	.68	.37	.21
5	\$7,000-\$9,000	2.60	2.18	1.75	1.33	.91	.49	.28
6	\$9,000-\$11,000 ...	3.25	2.72	2.19	1.67	1.14	.61	.35
7	\$11,000-\$13,000 ..	3.90	3.26	2.63	2.00	1.37	.74	.42
8	\$13,000-\$15,000 ..	4.54	3.81	3.07	2.33	1.60	.86	.49
9	\$15,000-\$17,000 ..	5.19	4.35	3.51	2.67	1.82	.98	.56
10	\$17,000-\$19,000 ..	5.84	4.89	3.95	3.00	2.05	1.11	.63
11	\$19,000-\$21,000 ..	6.49	5.44	4.39	3.33	2.28	1.23	.70
12	\$21,000-\$23,000 ..	7.14	5.98	4.82	3.67	2.51	1.35	.77
13	\$23,000-\$25,000 ..	7.79	6.53	5.26	4.00	2.74	1.47	.84
14	\$25,000-\$27,000 ..	8.44	7.07	5.70	4.33	2.96	1.60	.91
15	\$27,000-\$29,000 ..	9.09	7.61	6.14	4.67	3.19	1.72	.98
16	\$29,000-\$31,000 ..	9.74	8.16	6.58	5.00	3.42	1.84	1.05
17	\$31,000-\$33,000 ..	10.39	8.70	7.02	5.33	3.65	1.96	1.19
18	\$33,000-\$35,000 ..	11.04	9.24	7.46	5.67	3.88	2.09	1.12
19	\$35,000-\$37,000 ..	11.69	9.79	7.89	6.00	4.10	2.21	1.26
20	\$37,000-\$39,000 ..	12.33	10.33	8.33	6.33	4.33	2.33	1.33
21	\$39,000-\$41,000 ..	12.98	10.88	8.77	6.67	4.56	2.46	1.40

§ 1036.3 Earmarking.

Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, Retain Income, Unappropriated to Account 797, Retained Income, Appropriated, an amount

equal to the net credit balance resulting from any incentive per diem settlement involving boxcars subject to this part. The carriers shall maintain a separate bank account for the segregated funds. Canadian carriers shall transfer a net balance after taxes to a U.S. designee, which may be either a United States class I railroad or a United States corporation established solely to purchase, hold title to, and control general service, unequipped boxcars subject to the Department of Transportation's safety regulations and the Interstate Commerce Commission's rules pertaining to per diem and car service, and to any reporting requirements determined to be applicable by the Commission's Bureau of Accounts. If the designee of Canadian carriers is a United States railroad, it shall maintain a separate account for funds received on Canadian-owned boxcars. All boxcars purchased or built by such designee or such other corporation with incentive per diem funds earned on Canadian boxcars must be built in the United States. Any United States taxes incurred after transfer of a net balance to such designee may be deducted from the transferred amount for the purpose of determining a final net balance for investment. The earmarked funds shall be reduced by the amount of the additional income tax paid as the result of increasing taxable income by inclusion of net incentive per diem earnings. The funds in such account shall be used to purchase, lease, or build new, unequipped boxcars for general service or to rebuild general service, unequipped boxcars with code numbers and mechanical designations set forth in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. The unexpended funds remaining in the accounts of the carriers may be invested in Government bonds or other interest-bearing, temporary securities. The interest earned thereafter shall become part of the earmarked fund.

[40 FR 16846, Apr. 15, 1975]

§ 1036.4 Use of funds.

The net credit balances resulting from incentive per diem settlements, which are earmarked in accordance with § 1036.3, may be drawn down in whole or in part at any time by the carrier to build, lease equivalent of purchase, or purchase, in whole or in part, new unequipped boxcars for general service described in § 1036.1, *provided*, The carrier has in the same calendar year built, leased, or purchased its 1964-68 average acquisitions of such boxcars and made up an arrearage in having failed to maintain such average each year this order is in effect. Earmarked funds may also be used in whole or in part to lease any number of new unequipped boxcars for general service described in § 1036.1, in which the carrier is not acquiring an equity interest, *provided*, The carrier has in the same calendar year leased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Nonequity leases must be at least 10 years in duration and in connection with such leases, earmarked funds must not be used for the cost of maintenance. Earmarked funds may be used in whole or in part to rebuild any number or portion of general service, unequipped boxcars described in § 1036.1, *provided*, The carrier has in the same calendar year rebuilt its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Net balances on Canadian-owned cars may be drawn down without regard to prior acquisitions, but where the designee is a class I United States carrier such drawdowns shall not affect that carrier's accumulation of arrearages resulting from prior failure to build, rebuild, lease, or purchase its 1964-68 arrearages. However, upon application, including a showing that all parties to the proceeding herein have been notified by the carrier on such application and a showing of good cause why any carrier is unable to draw down in whole or in part the net credit balance resulting from incentive per

diem settlements because it cannot comply with the above test period average requirements of having in the same calendar year built, rebuilt, leased, or purchased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect, the Commission may, in its discretion, after consideration of all views regarding the application, modify the test period average to the extent consistent with the public interest and the national transportation policy. Such modification, as a minimum, shall require that a carrier match the earmarked funds it will use with an equal amount of its own funds. Earmarked funds must be put to use within 18 months after the end of the calendar year in which the funds are collected and result in a net credit balance for the building, rebuilding, leasing, or purchasing of general service, unequipped boxcars described in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. Upon a showing of good cause an application, including a showing that the parties to the proceeding herein have been notified by the carrier of such application may be made to the Commission for waiver of the said 18-month period, which may, in the Commission's discretion, be granted after consideration of all views regarding the application. If the earmarked funds are not used within the 18-month period, they may be voluntarily surrendered to Rail Box whose establishment and operation was approved in Finance Docket No. 27589, *American Rail Box Car Company and Trailer Train Company, et al.—For Approval of the Pooling of Car Service with Respect to Box Cars*. If the carrier fails within the stated period to put to use collected earmarked funds which result in a net credit balance, has not obtained relief from that requirement, and has not surrendered such funds to Rail Box, the Commission will investigate the matter to determine what, if any, corrective action is warranted. Appropriate corrective action would include section 16(12) remedies among others. Carriers may make temporary investments of unexpended

funds in Government bonds or other liquid securities. Such securities must be readily convertible to cash so that funds remain available for boxcar purchases. Interest earned must become part of the earmarked fund. As used in this section, "build," "rebuild," "lease," or "purchase" refer to a commitment to build, rebuild, lease, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier or the car supplier, a car that is delivered after 10 months from the date of commitment may qualify if approved by the Bureau of Accounts of this Commission.

[40 FR 16846, Apr. 15, 1975]

§ 1036.5 Effective date.

The rules set forth in §§ 1036.1 and 1036.2 shall be effective from May 1, 1973, and shall continue in effect until further order of the Commission" and substituting therefor the words "apply for a 6-month period from September 1 of each year through February 28 of the following year on unequipped general service boxcars. The rules set forth in § 1036.1 and 1036.2 shall apply on XF cars on a year-round basis."

[35 FR 7122, May 6, 1970, as amended at 38 FR 8657, Apr. 5, 1973; 40 FR 33220, Aug. 7, 1975]

§ 1036.6 Rules and regulations suspended.

The operation of all rules and regulations, insofar as they conflict with the provisions of this part, is hereby suspended. The charges herein provided shall be paid for each day cars are held, but nothing in this part shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.